have easily guided the justices in resolving this case.

But in a highly unusual order issued days after oral arguments, the justices asked both sides to consider a potential compromise—having a religiously affiliated employer tell an insurer of its objection to birth control coverage, and then having the insurer separately notify employees that it will provide cost-free contraceptives, without any involvement by the employer.

In Monday's opinion, the court said both sides' responses indicated that a compromise was possible. Without weighing in on the merits of the litigation, the court sent the lawsuits back to the federal appeals courts and told them to give the parties ''an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage.''

This move solves nothing. Even if these plaintiffs can find their way to an agreement with the government that satisfies their religious objections, there are other employers with different religious beliefs who will not be satisfied, and more lawsuits are sure to follow.

The court could have avoided this by affirming the appellate decisions that correctly ruled in the government's favor. Unfortunately, the justices appear to be evenly split on this issue, as they may be on other significant cases pending before them.

The court's job is not to propose complicated compromises for individual litigants; it is to provide the final word in interpreting the Constitution and the nation's laws. Despite what Senate Republicans may say about the lack of harm in the delay in filling the vacancy, the court cannot do its job without a full bench.

[From the Economist, May 9, 2016]

WHY THE SUPREME COURT IS SLOWING DOWN

With five votes, the late Justice William Brennan liked to tell his clerks, ''you can do anything around here''. Justice Brennan's rule still applies after the death in February of Antonin Scalia. But with only eight justices remaining, the magic number of five is now harder to come by. Twice since Mr. Scalia's death the Supreme Court has performed the judicial equivalent of throwing up its hands. In a small case concerning banking rules and in a hugely consequential case challenging the future of public-sector unions, the justices issued one-sentence per curiam (''by the court'') rulings: ''The judgment is affirmed by an equally divided court.'' A tie in the high court means that the ruling in the court below stands. But a tie-induced affirmance does not bind other lower courts, and the judgment has no value as a precedent. A tie, in short, leaves everything as it was and as it would have been had the justices never agreed to hear the case in the first place.

That's a lot of wasted ink, paper, time and breath. And now it seems the justices may be keen to reduce future futile efforts as they contemplate a year or more with a missing colleague. As Robert Barnes wrote in the Washington Post last week, the Supreme Court's pace of ''grants''—cases it agrees to take up—has slowed. Only 12 cases are now on the docket for the October 2016 term that begins in the fall, and grants are lagging below the average of recent years. The slow pace is especially notable because it marks a slowdown from an already highly attenuated docket. Seventy years ago, the justices decided 200 or more cases a year; that number declined to about 150 in the 1980s and then plummeted into the 80s and, in recent years, the 70s. The justices will grant more cases in dribs and drabs following their private conferences in May and June and after the so-called ''long-conference'' in September (followed by more conferences throughout the autumn and winter), but early indications are that the term starting in October may be one of the most relaxed in recent memory.

The Obama administration continues to push Senate Republicans to change their minds and hold confirmation hearings for Merrick Garland, chief judge of the District of Columbia circuit court. While a number of GOP senators have agreed to meet Mr. Garland for lunch or tea, none have endorsed him or said he should have a hearing. The fight to fill Mr. Scalia's seat before the next president takes office includes a new hashtag (#WeNeedNine) and a counter showing the number of ''days of obstruction'' in the Senate since Mr. Obama tapped Mr. Garland for the job. (That number is 51 and counting.) But the Republican leadership isn't budging. Charles Grassley, chair of the judiciary committee, admits that leaving the appointment to the next president is a ''gamble'' given that Donald Trump is now all-but certain to be the Republican nominee, but he is sticking to his guns.

What's wrong with eight justices? The primary worry is that tie votes will sow legal confusion and uncertainty. When justices are split down the middle, they cannot resolve rival views on crucial national issues—from affirmative action and public unions to gay rights, birth control and abortion. By letting lower-court decisions stand but not requiring other courts to abide by the ruling, the stage is set for odd state-by-state or district-by-district distinctions when it comes to the meaning of laws or the constitution. This seems to be the worry that prompted the justices to search for a compromise after hearing arguments in March in the latest fight over Obamacare and contraception. One federal district court has said that the contraceptive mandate violates a 1993 law banning the government from unduly interfering with other people's religious scruples. A half dozen other appellate courts have come to the opposite opinion. So if the justices divide 4–4 in Zubik v Burwell, women across most of America will have access to birth control through their employer's health coverage, while women in seven midwestern states will not. The justices' unprecedented effort to square the circle by playing mediator does not look promising.

Some legal scholars argue that an eight-justice bench isn't so bad after all and might actually be preferable. Eric Segall, a professor of law at Georgia State University, thinks the 4–4 ideological divide is pushing justices to moderate their claims in an effort to win votes from their colleagues on the other side. ''[T]o accomplish their goals'', Mr. Segall writes, ''the Justices would simply have to get along better''. This is a prescription, he says, to ''more public confidence in the final outcomes'' of Supreme Court decisions. We may have seen just such a compromise at work in a recent voting-rights decision, Evenwel v Abbott. After the oral argument in December, most pundits (including your correspondent) were expecting a 5–4 decision upending the common understanding of ''one person, one vote'' (counting everybody) in favour of counting only eligible voters, a scheme favouring whiter, wealthier, GOP-leaning districts. But the justices came out 8–0 in the other direction. The four liberals seem to have attracted the conservatives' votes (though Justices Samuel Alito and Clarence Thomas disagreed with the reasoning) by lowering the temperature a bit: the constitution permits states to use total population as the basis for drawing districts, Justice Ruth Bader Ginsburg wrote for her colleagues, but the question of whether it requires them to do so is off the table until a case forces it back on.

But beyond the Evenwel surprise and the seemingly ill-fated attempt to resolve the dicey dilemma in Zubik, it's very hard to see how a denuded court is an appealing concept in the medium or long-term. A patchwork quilt of legal realities may have been fitting for America under the Articles of Confederation, before the country had a political system that made it something approximating a union, but America's constitutional design is not consonant with deep confusion about what the law means on controversial questions of public life. While the bind they're in may lead to occasional compromises, the justices will only bend so far. Whether the divide manifests as 4–4 splits or a tendency to hear fewer cases in which those splits seem likely, a curbed Supreme Court is not a court that can possibly live up to its name.

VOTE EXPLANATION

Mr. WYDEN. Mr. President, I regret that due to travel delays on my return from Oregon, I missed the vote yesterday on the confirmation of the nominee, Paula Xinis, to fill a judicial emergency vacancy in the U.S. District Court for the District of Maryland.

Ms. Xinis was nominated more than a year ago. The ABA Standing Committee on the Federal Judiciary unanimously rated Xinis ''Well Qualified'' to serve on the district court, its highest rating. She has the support of her home State Senators, Senators MIKULSKI and CARDIN. She was voted out of the Judiciary Committee by voice vote on September 17, 2015. In addition, 20 judicial nominees for lower court vacancies that were all voted out of committee by unanimous voice vote are currently on the Executive Calendar. It is important that the Senate work to prioritize filling these vacancies.

For those reasons, had I not experienced travel delays and been present as originally intended, I would have voted in support of her nomination.

NATIONAL HURRICANE PREPAREDNESS WEEK

Mr. VITTER. Mr. President, I wish to recognize the week of May 15 through 21, 2016, as National Hurricane Preparedness Week.

As each Louisianian knows, the beginning of June marks the beginning of hurricane season, and we are acutely aware of how dangerous and damaging these storms can be. As we recognize National Hurricane Preparedness Week, I want to emphasize the importance of making adequate preparations to keep our families and communities safe. While it is impossible to predict when a disaster will strike, being informed, prepared, and having a plan can make all the difference in the world.

The National Hurricane Center recommends that folks take specific steps to prepare, such as creating a plan for your family, buying proper supplies